

## “Proportionality” And Multiple Independent Medical Exams

October 4th, 2010



One of the biggest changes in the New BC Supreme Court Civil Rules is the requirement that the court secure the determination of a proceeding in ways that are “proportionate to the amount involved in the proceeding, the importance of the issues in dispute, and the complexity of the proceeding”.

Reasons for judgement were released today considering this concept in relation to ICBC’s request for multiple independent medical exams in an injury lawsuit.

In today’s case ([Kim v. Lin](#)) the Plaintiff was injured in a 2006 BC collision. She sued for damages and ICBC defended as statutory third party. The Plaintiff gave evidence at her discovery that she suffered from pain in numerous areas in her body including “problems with her eyes, ringing in her ears, neck pain, problems with her shoulders and shoulder blades, her upper back, her hip, her lower back, bruising to her hips, leg, knee and ankle pain, as well as headaches, dizziness, hair loss, weight problems and a variety of emotional problems, including impaired memory and concentration, sleep, fatigue and decreased energy levels”.

In the course of the claim the Plaintiff attended two medical appointments arranged by ICBC, the first with a neurologist, the second with a psychiatrist. ICBC had also secured reports from two of the Plaintiff’s treating physicians. ICBC wished to have the Plaintiff assessed by an orthopaedic surgeon but the Plaintiff refused arguing such an application was not necessary. Mr. Justice Voith ultimately decided that this assessment was necessary in order to ‘balance the playing field’ and ordered that the Plaintiff attend.

In reaching this decision the Court considered the role that proportionality plays when a defendant asks a plaintiff to attend multiple independent medical exams. Mr. Justice Voith provided the following useful discussion:

[28] Finally, I turn to the relevance of the severity of the plaintiff’s injuries and the alleged impact of those injuries on Ms. Kim. These issues are also germane to the plaintiff’s submission that “proportionality” should influence the outcome of this application. While R. 1-3(2) establishes that “proportionality” is an over-arching consideration which informs the interpretation and implementation of the Rules, its significance, however, is greater for some Rules than for others.

[29] Thus, for example, the former R. 26, which related to document production, imposed a uniform obligation to produce documents under the well-known Peruvian Guano standard, affirmed in *Fraser River v. Can-Dive*, 2002 BCCA 219 at 12, 100 B.C.L.R. (3d) 146. Rule 7-1(1) has modified this uniform standard. Instead, Rules 7-1(11)-(14) dictate how and when the production of additional documents may be required. Within this regime, “proportionality” will no doubt have much influence.

[30] In other cases or for other Rules, however, the reality is that “proportionality”, though not expressed in precisely those terms, has historically and inherently already played a significant role. The former R. 30(1) is an example of this. Under R. 30(1), courts routinely considered, as one of many factors, the severity of the plaintiff’s injuries and the potential magnitude of the plaintiff’s claim in addressing the appropriateness of further independent medical examinations.

[31] Thus, for example, in *Gulamani v. Chandra*, 2008 BCSC, 1601 Madam Justice Arnold-Bailey, in addressing the factors that underlay her decision said, in part, at para.34:

*...Third, the nature of some of the plaintiff's claims in this case, including a thoracic outlet syndrome and chronic pain syndrome, and the plaintiff's claim relating to her ongoing physical and mental disability such that she is unable to practice her profession and properly care for her family, make it a case of significant size and medical complexity.*

*[32] Similarly, the former R. 68, regarding expedited litigation, engaged in very similar considerations, with its reference to "proportionality" in R.68(13) and its presumptive direction of "not more than one expert" in R.68(33).*

*[33] Ms. Kim is a young woman. She says she suffers severely from multiple complaints. She asserts that many of these injuries are acute in terms of their severity and the ongoing difficulty they cause her. By way of example, and without addressing each of her injuries, Ms. Kim claims that she presently suffers from both headache and neck pain which she rates on a pain scale at an 8 or 9 out of 10, where 0 equates to no pain and 10 equates to such severe pain that it would cause one to seek emergency medical treatment. She has discontinued her studies. The report of Dr. Tessler at page 3 indicates that she now only works two days a week.*

*[34] If it can be established that Ms. Kim's present circumstances were caused by the Accident, the "amount involved" in her claim has the prospect of being quite significant, a relevant consideration under R.1-3(2)(a). Similarly, the "issues in dispute", a relevant consideration under R.1-3(2)(b), are important for both parties.*

*[35] Accordingly, I am satisfied that considerations of "proportionality" do not militate against the third party's application but rather support the appropriateness of the medical examination before Dr. Kendall that it seeks. Further, I do not consider that the purpose of the report of Dr. Kendall can properly be said to either bolster the report of Dr. Tessler or to undermine its findings. Instead, I am satisfied that a further examination of Ms. Kim by Dr. Kendall is necessary to have the plaintiff's concerns properly addressed by a physician with the requisite or appropriate expertise.*